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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

No. 194.

FEDERAL TRADE COMMISSION, *Petitioner,*

v.

R. F. KEPPEL & BRO., INC., *Respondent.*

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENT.

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BRIEF FOR RESPONDENT.

OPINION BELOW.

The opinion of the Court below—the Circuit Court of Appeals for the Third Circuit—(R. 371) is reported in 63 Fed. (2d) 81.

JURISDICTION.

The judgment of the Circuit Court of Appeals for the Third Circuit was entered January 25, 1933 (R. 383). The

petition for certiorari, under extension of sixty days duly obtained from a Justice of this Court, was filed June 21, 1933, and was granted October 9, 1933 (R. 386). The jurisdiction of this Court arises under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, and Section 5 of the Federal Trade Commission Act (c. 311, 38 Stat. 717, 719; U. S. C. Title 15, Sec. 45).

THE QUESTION.

The question presented concerns the jurisdiction of the Federal Trade Commission to make the cease and desist order in this case. The Court below ruled that the Commission was without such jurisdiction and reversed the order (R. 376).

More particularly, the question is as to the power of the Commission to require that the respondent, R. F. Keppel & Bro., Inc., shall cease and desist from the sale and distribution to wholesale dealers and jobbers in interstate commerce of packages or assortments of candy in which (a) were contained larger pieces of candy or articles of merchandise to be given as prizes, dependent upon the color of the centers of said candies; or (b) assortments in which slips of paper were contained in each wrapper upon which were printed varying prices to be paid for said candy or that it was free; and (c) assortments containing a number of pieces in which a sum of money was concealed; with which assortments of candy respondent furnished display cards, truthfully describing the sales plan being used.

A further question concerns the jurisdiction of the Commission, by its order, to prohibit the "packing and assembling" of assortments described in (a) and (b)—purely intrastate operations of "manufacture" and not "commerce"; but an affirmance of the decision of the court below will render it unnecessary to pass thereon.

THE STATUTE.

Section 5 of the Federal Trade Commission Act (38 Stat. 717, 719) is printed substantially in full in the appendix of the Commission's brief (pp. 43-6). Respondent accordingly sets forth here but the immediately relevant language of that section on which it feels this case turns:

> Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition in commerce, and if it shall appear to the commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, * * * a complaint * * *.

STATEMENT.

The facts that the Commission sets forth in its brief appear to respondent to be incomplete and it therefore respectfully submits the following supplementary statement.

It is particularly significant to note that the complaint of the Commission makes no charge of deception or fraud, nor is there any charge of monopoly. On the contrary, counsel for the Commission during the trial of this case expressly disclaimed any attempt to charge respondent with "a false misleading or untrue statement" (R. 70), "any intention to deceive the public or the consumer" (R. 71), and on page 70 of the record the examiner stated there was no charge of "false and misleading advertising" and likewise no charge of "any false statement, or false or misleading advertising involved in this case".

Nor does the complaint in this case charge "undue restraint of trade". There has been no charge in this case that respondent's sales plan places any restriction on the right of other candy manufacturers to dispose of their merchandise in any manner or through any agency which to them seems desirable, or any restriction upon the right of the jobbers who dispose of respondent's candies to handle

those of other manufacturers, whether such other manufacturers do or do not use the same sales plan. Respondent has never refused to sell its goods because of the failure of the retailer to sell the "break and take" candies (R. 76).

There is no more advantage to respondent in selling the so-called "break and take" assortments here involved than other type of candy handled by respondent (R. 72) *i. e.* the scale of profit on "break and take" and "straight goods" is the same (R. 72), and it is not disputed that respondent's entire box, *i. e.* the candy and the prizes, contains as much value as any box of "straight goods" (R. 72).

This proceeding was very largely instigated by the National Confectioners Association, which had endeavored as early as 1927 to stop the "break and take" packages (R. 151, 81). At least two of the manufacturers who testified were members and former officers of that Association (R. 150,287). Another testified that three officers of his company had held office in the Association (R. 247). In addition, two testified they were members of and represented on the list of officials of the New England Confectioners Association (R. 287-8, 325). One of the manufacturers, Voneiff, who testified in person that he was a member of the national association and an ex-officer, was the same individual whose company furnished four out of the five salesman witnesses before the Commission (R. 162, 171, 210 and 217). Respondent withdrew from this Association as it was trying to put respondent out of business (R. 82) and the business from this package "puts us in the profit column instead of the loss" (R. 87). A number of other manufacturers resigned at the same time, and for the same reason (R. 88-9).

Of the 450 members of the National Confectioners Association, 380 or 85 per cent manufacture "break and take" candies. Of the 15 per cent who do not manufacture "break and take" assortments, some do not because it was not suited to their type of merchandise (R. 101) or because they specialize in licorice which has never been made the subject of such an assortment (R. 270).

In its review of the evidence, the Commission on page 4, points out that 60 per cent of respondent's business consists of the "break and take" assortments but it fails to point out why this is so. From pages 67 and 68 of the Record, it appears that respondent has made a "drive on that particular type of package" because while there is more straight merchandise sold than "break and take" packages throughout the United States

> * * * certain channels have practically a monopoly on straight merchandise.
>
> As an illustration, your chain stores sell today three five-cent bars for five cents. That leaves the little merchant, the independent man, high and dry. He cannot compete, because the chain stores buy merchandise at exactly the same figure as the wholesaler can. So that leaves this type of merchandise for the little fellow to eke out his existence on. (R. 68)

Thus it appears the small merchant consumes most of the break packages and would be the most injured if the Commission's order were affirmed, because the "Five and Ten Cent Stores have a monopoly on bulk candy while chain stores have a monopoly on 5c bars which leaves the little man with the penny goods, the individual man" (R. 68).

From the testimony of the Commission's chief witness, Voneiff, it appears that his company is one of those selling to the "chain stores, and syndicate stores, syndicate drug companies" (R. 122) which handle only staple or straight goods (R. 153) and while his company makes "break and take" packages, this represented only about 5 per cent to 8 per cent of its business in 1930 (R. 141). This witness also makes a great quantity of straight goods for which he has a chain store outlet. Two other witnesses, making a total of three, also sold to chain stores (R. 257 and 271).

On this testimony the Trial Examiner found, as shown by his Paragraph VII (R. 340):

> The demand in the trade for the "Break and Take" goods comes from the smaller dealers. The chain stores and other large retailers, such as the five and ten-cent stores, sell large quantities of straight goods at prices which the small retail dealer cannot meet, therefore, he turns to "Break and Take" goods in order to draw trade to his store (R. pp. 50, 70).

The Commission alleges (p. 12) that nine "representatives of competitors of respondent," testified that their business was adversely affected by sales of "break and take" candies, but this is a most unfair and glaringly erroneous statement. For example, from the first of these witnesses respondent finds no testimony that his company was in competition with respondent but solely that "any candy manufacturer is a competitor when they make the same type of merchandise" (R. 98), and this is all he means when he later says his company has "lots of competitors" making these products—"competitors in a general way. One competitor in candy is a competitor with another one" (R. 98). Indeed, this witness' only business connection with the respondent has consisted in the sale of merchandise to respondent over a period of years (R. 106). The second manufacturer to appear—the witness Voneiff mentioned above—testified (R. 120-162) at length upon the experience of his company and his impressions of the influence of "break and take" packages upon the industry as a whole, but not one word appears in his testimony to link his company with *respondent,* and *its* business practices. Examination of the testimony of seven other manufacturers' representatives called by the Commission reveals almost exactly the same situation. One is typical of the rest, when he says (R. 265) "any candy item itself which sells for a penny I consider in competition with our product".

Only one manufacturer testified directly that his product was in competition with respondent's candy, and he did so only in most general terms. Surely this is not evi-

dence of that substantial competition required by the statute.

Of the five salesmen and jobbers who testified, four were employed by the Voneiff-Drayer Company (R. 162, 171, 210 and 217) which in 1930 sold 92 to 95 per cent of its product to the chain stores. Furthermore, it was not shown that the last two witnesses, small store keepers, ever dealt in respondent's candies (R. 112-3 and 117).

Thus, we have here merely evidence that respondent makes such packages and sells them in interstate commerce. The testimony after that is all as to the trade generally, which does not lay a foundation for a cease and desist order against an individual manufacturer. Respondent moved opportunely to strike all such evidence (R. 195-8), which motion was denied notwithstanding the Examiner expressed his view that such evidence was immaterial on the issue of unfair competition as it affected respondent—the sole issue in the case (R. 198).

Practically the only direct and uncontradicted testimony as to respondent is that given by the Commission's witness, one P. M. Smith, who states (R. 106) in answer to the question "Have you ever had any connection or business relations of any kind with this respondent?" said that "I have sold them merchandise for years in their jobbing department and we were very happy in every way. Mr. Keppel is a personal friend"; and on page 294 where another witness testifies "We have had dealings with Keppel and found them always to be upright and very friendly".

Thus the Commission was not justified in including in its Finding Nine a statement that the use of *respondent's* sales methods is prejudicial and injurious to the public and to competitors. This Finding, which is a conclusion rather than a purely factual statement, represents a decided change in the views of the trial Examiner who heard the testimony in this case, and who stated in Paragraph IX of his report that (Italics ours):

There is no evidence in the record that any competitor of the respondent has been injured in his business by reason of the "Break and Take" product manufactured and distributed by respondent, other than that which shows that the business of all candy manufacturers who make only "Straight Goods" is injured by all "Break and Take" goods on the market.

In addition to lack of evidence of substantial competition, the testimony concerning the existence of any adverse effect of the prize assortments on the sales of other manufacturers, even though not competing with this respondent, was not unanimous. For example, one witness stated that the loss of business (incidentally, during depression years) was due partly to other reasons (R. 306), and another that such loss was partly owing to his company's failure to nationally advertise its product (R. 282). The testimony of still another witness was not as to the sales of his company but generally on the decrease of all penny goods sold by the industry (R. 249), and even as to this, his testimony was "more or less an estimate, *a guess and a wild guess,* that is all. I do not think that anybody could guess accurately on it." (R. 248.) When pressed by Commission counsel to testify to a decrease in his company's sales due to prize assortments, this witness stated that he could not "prove it" (R. 253). The testimony of another was merely an opinion and was stated to be so (R. 261) and was hence worthless. One of the manufacturers called as a witness for the Commission testified that his company had always made a fair return on its investment (R. 238). A salesman called as a witness testified that he lost no customers when he did not have the "break and take" package to offer (R. 220) and that he did not see there was any greater demand on the part of children for "break and take" candy than for "straight goods" (R. 222-3). From another salesman it appears the practice is old, for he testified that he remembered buying such assortments as a very small child

(R. 217). One of the Commission's witnesses testified that in his opinion the practice was legal (R. 207).

The witness referred to by the Commission (p. 13) who testified that his penny goods business had been cut as much as 50 per cent by "break and take" packages and that he had lost customers because he did not sell this merchandise, also testified that he was not familiar with respondent's assortments because they were not seen in Boston, where his business was located (R. 294).

One storekeeper testified before the Commission (R. 113) that he did not handle "break and takes" and when questioned whether his failure to sell that type of package lost him any sales stated "Well, perhaps just for a while, but then they forgot all about it and bought other candy." (R. 115.)

The Commission invites attention to a number of findings but it is significant that it fails to invite attention to Paragraph Eight (R. 18) reading in part "All sales made by respondent, whether to wholesalers and jobbers, or to retail dealers, are absolute sales, and respondent retains no control in any manner over the goods after their delivery to the wholesale dealer or jobber, or retail dealer."

SUMMARY OF ARGUMENT.

Under Section 5 of the Federal Trade Commission Act three conditions must exist simultaneously before a cease and desist order is justified; First, that there be present methods of competition in commerce, secondly, that such methods are "unfair", and thirdly, that a proceeding by the Commission in respect of that practice would be to the interest of the public. The absence of any one of these elements is fatal to the Commission's cause.

Respondent submits that the Commission has failed to satisfactorily prove the existence of any one of these prerequisites to jurisdiction.

1. Adverting first to the requirement that the methods be

"unfair," the message of President Wilson recommending the enactment of, and the reports of the Committees of Congress in charge of, the Federal Trade Commission Act disclose that law was aimed primarily at those practices tending to restrain trade or create monopoly. The Act must be interpreted in the light of this purpose. The Courts have so recognized in numerous cases including *Federal Trade Commission v. Raladam Company*, 283 U. S. 643; *Federal Trade Commission v. Gratz*, 253 U. S. 421, 433-6; *L. B. Silver Company v. Federal Trade Commission*, 289 Fed., 985, and *Northam Warren Corporation v. Commission*, 59 Fed. (2d) 196.

Accordingly, the Courts have sustained the Commission in ordering discontinuance of practices which clearly tended to restrain trade or to create monopoly, such as the practices of resale price maintenance, *Butterick Company v. Federal Trade Commission*, 4 Fed. (2d) 910; false propaganda and conspiracy to boycott, *Chamber of Commerce of Minneapolis v. Federal Trade Commission*, 13 Fed. (2d) 673; refusal to sell to dealers failing to adhere to a resale price maintenance plan, *Hills Bros. Company v. Federal Trade Commission*, 9 Fed. (2d) 481, and others of like nature.

The only other concept comprehended under the doctrine of unfair competition involves deception, or as this court stated in *Federal Trade Commission v. Gratz, supra*, "deception, bad faith, fraud or oppression." A typical instance of the application of this principle is the case of *Royal Baking Powder Company v. Federal Trade Commission*, 281 Fed. 744, involving misleading advertising of cream of tartar baking powder. But this doctrine is not to be stretched to cover practices which might be deemed at most merely unethical or disapproved, and do not constitute deception, for as stated in *Northam Warren Corporation v. Commission, supra*, "where unlawful restraint of trade has been ordered to be discontinued it has always appeared that

there was some dishonesty in labeling or marketing the goods."

The Commission in this case neither charged in its complaint, nor proved, practices which constituted attempts to create monopoly within the interpretation assigned to that phrase by the courts nor did it charge and prove any "deception". Indeed, the Commission expressly disclaimed "any intention to deceive the public or the consumer" (R. 71).

The public is not deceived regarding the merchandise to be sold by petitioners nor the plan under which it is offered. Advertising matter or display cards explaining the method in detail is furnished with each assortment and it has been held by the court below and not heretofore contested that such cards are in all respects fair and true. Public policy is not involved because there is no charge of any "dangerous tendency" unduly to hinder competition or create monopoly. Thus we clearly have here no deception, bad faith, fraud or oppression or any dangerous tendency to create a monopoly.

2. In respect of the requirement of public interest, this Court has established that a general public interest will not suffice, but the public interest which meets the terms of the Federal Trade Commission Act must be based directly on the same tendency to create monopoly or the same deception, which meets the requirement of "unfairness". In *Federal Trade Commission v. Raladam Company, supra,* Mr. Justice Sutherland, in speaking for the Court, said that in order to support an order of the Commission the methods must tend to the substantial injury of the public "by restricting competition in interstate trade and 'the common liberty to engage therein' ". Again, in *Berkey & Gay Furniture Company v. Federal Trade Commission,* 42 Fed. (2d) 427, the court, following the *Gratz* case, held there must be some practice "characterized as deception, fraud or even unfairness" and that injury to the public interest is "*thereby*" shown; and as the court held in *Northam*

Warren Corporation v. Federal Trade Commission, supra (p. 198) (italics ours):

> * * * In order that the Commission proceed in the public interest, the Courts have insisted not only upon a showing that the practice is unfair and disapproved, *but also that the public are misled thereby, Federal Trade Commission v. Klesner, supra.*

Hence the requirement of public interest is indissolubly linked with the deception or tendency to create monopoly which meets the requirement of unfairness, and thus if there is no unfairness there is not that type of public interest to which the statute refers. Furthermore, the public interest must be "specific and substantial", *Federal Trade Commission v. Klesner,* 280 U. S. 19, 28, and merely isolated instances of possible or potential injury will not suffice.

It is to the interest of the public that the "break and take" assortments be continued, for through them the small independent candy merchant and store keeper can continue in business, despite the competition of chain stores, which have a virtual monopoly on "straight" candy sales because of their trade advantages. The affirmance of the order of the Commission would concentrate the greater part of the penny candy trade in the hands of these large chain stores, which are interested in eliminating the competition of respondent and other manufacturers of "break and take" assortments. The Commission's order would tend to produce monopoly rather than eliminate it.

3. Upon the requirement that the methods be methods of "competition" in commerce, this Court, in *Federal Trade Commission v. Raladam Company,* 283 U. S. 643, held insufficient testimony from physicians, one an officer of the American Medical Association, supplemented by a list of the other manufacturers of anti-fat remedies and obesity cures, with some very vague testimony of the purchase of several such remedies on the market. Direct testimony as to the Raladam Company's competitive situation was

missing, but in lieu thereof the record was full of medical testimony on the general harmful character of nearly all such remedies. No competitor was called to testify and no customer.

Hardly more adequate proof is presented here. The record is replete with general testimony relating to the entire candy industry, and the effect of "break and take" assortments on the trade as a whole. But the Commission produced no witness who identified himself as a consumer of respondent's package, or even as the parent of a consumer of respondent's package. Again, only one witness testified to direct competition from respondent's candy, and he was contradicted by another manufacturer from the same city who said respondent's product did not reach there. These facts are strikingly akin to those held inadequate in the Raladam case, and present, we submit, an all too meager basis on which to conclude that a showing of the existence of substantial "competition" has been made, sufficient to warrant the destruction of respondent's manufacturing business. Is there here an adequate basis upon which to conclude that there exists that injury to competitors, which is, as shown, indispensable to an "unfair method of competition in commerce"? More particularly, can it be said that the showing of injury to competitors is "*specific* and *substantial*", within the doctrine of *Federal Trade Commission v. Klesner*, 280 U. S. 19. Rather there is here merely a showing of a general policy on the part of the National Confectioners Association to stop this practice, and (the inference is certainly justified by the record) that policy was adopted at the instigation of the chain stores, valuable customers of the manufacturers, members and officers of the Association who testified in this case, which desires to eliminate the competition from the independent candy stores.

Since no unfair methods of competition are shown and no substantial and specific public interest, the Federal

Trade Commission is without jurisdiction. Accordingly, if there is anything in respondent's sales plan in contravention of the anti-lottery laws of the United States or of the several states that is a matter for some other agency of those governments and not for the Federal Trade Commission. The brief of the Federal Trade Commission in footnote (p. 32), states "No claim is made that respondent violated the federal lottery statutes."

4. Irrespective of what the decision of this court may be on those paragraphs of the Commission's order which relate to the selling and distribution of respondent's candy assortments, with their appropriate display cards, in interstate commerce, it is clear that the Commission went too far in paragraphs 4 and 5 of the order (R. 26-27) in attempting to prohibit respondent from "packing and assembling" its merchandise in any manner which its business judgment dictates. This is purely a "manufacturing" operation under the doctrine established in *Utah-Idaho Sugar Co. v. Commission*, 22 Fed. (2d) 122, upon the basis of the decision of this Court in *Kidd v. Pearson*, 128 U. S. 1, as distinguished from "commerce" which when interstate in character is subject to control by Congress. These paragraphs should be stricken from the order of the Commission in any event.

ARGUMENT.

I. The Complaint of the Federal Trade Commission Failed to Aver Nor Did the Evidence Prove that the Business Methods of Respondent Were "Unfair" Methods of Competition in Commerce.

(a) *The Judicially Established Meaning of the Term "Unfair."*

What constitutes "unfair" methods of competition in commerce was considered by this Court in the case of *Federal Trade Commission v. Gratz, supra,* where the practice complained of was the refusal of respondents to sell steel ties for binding bales of cotton unless the prospective purchaser would also buy the jute bagging used to wrap the cotton, and defined as follows (pp. 427, 428):

> The words "unfair method of competition" are not defined by the statute and their exact meaning is in dispute. It is for the courts, not the commission, ultimately to determine as matter of law what they include. They are clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly. * * *

This definition has been approved in all the later cases. See for example, *Federal Trade Commission v. Beech-Nut Company,* 257 U. S. 441, 453, and *Federal Trade Commission v. Raymond Company,* 263 U. S. 565, 572.

Thus we have a definition with two branches, viz., practices opposed to good morals and practices against public policy, but each branch contains specific limitations which may not be ignored. It is not sufficient that practices be merely opposed to good morals nor that they be merely against public policy, as the Commission claims in its attempt to broaden its jurisdiction beyond the prior decisions

on the subject. It is not enough to take either of the broad expressions "good morals" and "public policy" without the limitations thereon indicated and carefully applied by this Court. Instead the breach of good morals must arise from "deception, bad faith, fraud or oppression"; and the breach of public policy must arise "because of the dangerous tendency unduly to hinder competition or create monopoly." So far as has been discovered no court has broadened the definition of unfair competition so as to include any case which would not fall within one or the other of these two classes.

Respondent now proposes to discuss briefly the accepted meaning of the concepts of "monopoly" and "deception" (using this latter term broadly to cover the expression "deception, bad faith, fraud or oppression" in the Gratz opinion), under the Federal Trade Commission Act, as established by the decided cases, and to show that the methods assailed in this proceeding do not fall within their scope.

"Monopoly", *i. e.*, practices which tend to restrain trade or create monopoly within the Act, involve resale price maintenance plans, coercion of manufacturers by jobbers through threats of refusal to deal, and similar situations. *Hills Bros. Co. v. Commission*, 9 Fed. (2d) 481; *Cream of Wheat Co. v. Commission*, 14 Fed. (2d) 40; and *Southern Hardware Jobbers' Association v. Commission*, 290 Fed. 773. But in *Federal Trade Commission v. Sinclair Refining Company*, 261 U. S. 463, this Court held that the furnishing by oil refiners to dealers of pumps for nominal rental for handling their products, such use to cease if the dealer used in the pumps the products of others, did not constitute unfair competition because of the absence of any tendency to hinder competition. On the contrary, as here, competition was promoted as many small stores were thus enabled to handle gasoline. Indeed, all restraints or diversions of trade do not constitute monopolies of the character which constitute unfair methods of competition. *Sinclair Re-*

fining Company, supra; Federal Trade Commission v. Raymond Company, supra.

An example of the type of business practice which results in loss of business to competitors, but is not "unfair" under the Act occurred in *Federal Trade Commission v. Curtis Publishing Company*, 260 U. S. 568. There it was held that a method of merchandising magazines through exclusive agents was not an unfair method of competition, *even though many of the distributors had previously been general distributors disposing of magazines of other publishers, but under their new arrangement with the petitioner were compelled to cease representation of others.* As was said on page 582:

> Effective competition requires that traders have large freedom of action when conducting their own affairs. Success alone does not show reprehensible methods, although it may increase or render insuperable the difficulties which rivals must face.

The concept of "deception" has likewise been before the courts in numerous cases. An example of the deceptive practice which the Federal Trade Commission Act was designed to stop is *Federal Trade Commission v. Winsted Company*, 258 U. S. 483, where certain labels which "were false and calculated *to deceive*, and did in fact *deceive*, a substantial portion of the purchasing public" were held by the Commission to be unfair, and an order to cease and desist was sustained by the courts. In footnote below[1] are listed numerous cases where orders of the Commission were vacated by the courts because there was no *misrepresentation or deception* of the public.

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[1] *Northam Warren Corporation v. Commission*, 59 Fed. (2d) 196 (Second Circuit); *Indiana Quartered Oak Company v. Commission*, 58 Fed. (2d) 182 (Second Circuit) modifying 26 Fed. (2d) 340; *Arnold Stone, Inc., v. Commission*, 49 Fed. (2d) 1017 (Fifth Circuit); *Ohio Leather Co. v. Commission*, 45 Fed. (2d) 39 (Sixth Circuit); *The Philip Carey Mfg. Co. and The Philip Carey Co. v. Commission*, 29 Fed. (2d) 49 (Sixth Circuit); *Mennen Company v. Federal Trade Commission*, 288 Fed. 774.

Conversely, in the cases listed in a second footnote below,[2] because there existed *deception or misrepresentation* which was "unfair" because it diverted or tended to divert trade from competitors, the orders of the Commission were affirmed.

The tenor of the cases is shown by a few brief comments:

The use of the term "Duraleather" as a trade name to denote an imitation product containing no leather was enjoined by the Commission, whose order was upheld by the Circuit Court of Appeals for the Third Circuit in *Masland Duraleather Co. and W. & J. Sloane v. Commission, supra,* because of its tendency to mislead the public. As said on page 737, "A false trade name or one that has both the capacity and tendency to *deceive* the ordinary purchaser will be enjoined", citing numerous cases.

There was *misrepresentation* in the case of *Commission v. Kay, supra,* where respondent labeled his product as radium, it containing no true radium. A holding to the same effect was made in *Commission v. Bradley, supra,* in connection with the use of the word "English" in labeling a soap not made in England.

Again, in the case of *N. Fluegelman & Co., Inc. v. Federal Trade Commission,* 37 Fed. (2d) 59 (Second Circuit), the order of the Commission was modified because the trade-names "Satinmaid" and "Satinized", under which petitioner sold its product were partially justified by the use of a satin weave, and the court permitted the continued use of these trade-names upon the inclusion in the adver-

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[2] *Federal Trade Commission v. Royal Milling Company,* 288 U. S. 212; *Commission v. Good Grape Co.,* 45 Fed. (2d) 70 (Sixth Circuit); *Federal Trade Commission v. Kay,* 35 Fed. (2d) 160-2 (Seventh Circuit). Certiorari denied 281 U. S. 764; *Lighthouse Rug Co. v. Commission,* 35 Fed. (2d) 163 (Seventh Circuit); *Masland Duraleather Co. and W. & J. Sloane v. Commission,* 34 Fed. (2d) 733 (Third Circuit); *Commission v. Bradley,* 31 Fed. (2d) 569 (Second Circuit); *Federal Trade Commission v. Balme,* 23 Fed. (2d) 615-9 (Second Circuit). Certiorari denied 277 U. S. 598; *Procter & Gamble Co. v. Federal Trade Commission,* 11 Fed. (2d) 47-8 (Sixth Circuit). Certiorari denied 273 U. S. 717-718; *American Tobacco Co. v. Federal Trade Commission,* 9 Fed. (2d) 570, 575 (Second Circuit). Affirmed 274 U. S. 543; *Guarantee Vet. Co. v. Federal Trade Commission,* 285 Fed. 853-60 (Second Circuit); *Royal Baking Powder Co. v. Federal Trade Commission,* 281 Fed. 744-52 (Second Circuit).

tising matter of expressions to indicate that the product was not silk but was cotton. As was said on page 61 (italics ours):

> * * * Thus the petitioner would describe its "Satinmaid" and "Satinized" as a cotton fabric with a satin weave, which, *if thus truly made and truthfully displayed and offered to the purchasing public, will not be deceptive.* An order which would forbid such merchandising prohibits that which is lawful, and the order to cease and desist entered upon such a basis can not stand. Fed. Trade Comm. v. Curtis Pub. Co., 260 U. S. 568, 43 S. Ct. 210, 67 L. Ed. 408; Heuser v. Fed. Trade Comm. (C. C. A.) 4 F. (2d) 632.

In the recent case of *Northam Warren Corporation v. Federal Trade Commission, supra,* the Circuit Court of Appeals for the Second Circuit held that the use of paid testimonials without disclosing that such testimonials were paid for was not a deceptive practice within the jurisdiction of the Commission. Respondent takes the liberty of quoting from that opinion the same matter as did the court below (R. 374-5), because of the compact statement of many important principles which are applicable, respondent believes, to the instant case (p. 198):

> The Federal Trade Commission Act does not purport to establish a decalogue of good business manners or morals. Its purpose is to strike down at their inception practices which are unfair and which, if permitted to run their full course, would result in the creation of a monopoly and an undue restraint of trade. Even if a practice may be regarded as unethical, it would still be beyond the purview of the act if it lacks the public interest necessary to support the Commission's jurisdiction. *Fed. Trade Comm. v. Klesner,* 280 U. S. 19. The Commission does not suggest that these testimonials tend to create a monopoly; they do not have a tendency to create an undue restraint of trade. The strongest argument the respondent makes is that failure to state the price paid for the testimonial

amounts to deception and misrepresentation concerning the petitioner's product and in that way the petitioner is able to deprive honest manufacturers of a market. *Fed. Trade Comm. v. Winsted Hosiery Co.*, 258 U. S. 483. But where unlawful restraint of trade has been ordered to be discontinued it has always appeared that there was some dishonesty in labeling or marketing the goods. *Fed. Trade Comm. v. Winsted Hosiery Co., supra; Guarantee Veterinary Co. v. Fed. Trade Comm.*, 285 F. 853 (C. C. A. 2); *Royal Baking Powder Co. v. Fed. Trade Comm.*, 281 Fed. 744 (C. C. A. 2); *Procter & Gamble v. Fed. Trade Comm.*, 11 Fed. (2) 47 (C. C. A. 6). *In order that the Commission proceed in the public interest, the courts have insisted not only upon a showing that the practice is unfair and disapproved, but also that the public are misled thereby. Fed. Trade Comm. v. Klesner, supra.*

The use of testimonials, which are truthfully stated under the signature of the giver, cannot in any sense be regarded as unfair competition or as involving a tendency to restrain competition unduly, and the Commission was without jurisdiction to interfere. (Italics ours.)

Thus we have the gist of "unfair methods of competition" as defined by the decided cases, "deception", "misrepresentation", "bad faith", "oppression", or practices tending unduly to hinder competition or create monopoly. But the expression is, to revert again to the language of this court in the *Gratz* case, "clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by" (p. 427) any of these elements.

(b) The Respondent's Methods Assailed Herein Are Not Unfair.

In the instant case there is no charge in the complaint that respondent's sales plan places any restriction on the right of other candy manufacturers to dispose of their merchandise in any manner or through any agency which

to them seems desirable, or any restriction upon the right of the jobbers who dispose of respondent's candies to handle those of other manufacturers, whether such other manufacturers do or do not use the same sales plan. There is no charge in this case that respondent refuses to sell to its customers unless they will agree to refrain from purchasing the candy of other manufacturers, or that respondent places any restriction on the manner in which they shall market the "break and take" packages themselves. Hence the situation before this Court in the case of *Sinclair Refining Company, supra,* might be said to go further in its tendency to create monopoly than that here involved, but the Court had no difficulty in finding that there was no unfair competition; *a fortiori,* there can be no such competition in the instant case.

Nor was there any allegation in the complaint in this case of deception, bad faith, fraud or oppression. On the contrary, during the trial counsel for the Commission expressly disclaimed any attempt to charge respondent with a "false, misleading or untrue statement" (R. 70) or with "any intention to deceive the public or the consumer" (R. 71); and on page 70 of the record the examiner stated there was no charge of "false and misleading advertising" and likewise no charge of "any false statement, or false or misleading advertising involved in this case."

This failure of the complaint to charge that respondent's sales plans are deceptive or tend to the creation of a monopoly, is in itself fatal to the Commission's case, for this Court held in the *Gratz* case, *supra,* that the Commission's order "should follow the complaint; otherwise it is improvident, and, when challenged, will be annulled by the court". Indeed, in comparison with the complaint in that case, set forth by this Court on pages 425-426 of its opinion, the complaint in the instant case, appearing at pages 2 to 6 of the record, shows no substantial difference. Each, after stating that the proceeding is brought under Section 5 of the Act, acting in the public interest, and charging un-

fair methods of competition, identifies the parties and specifies in detail the practices complained of. The complaint in the *Gratz* case then states that the acts specified "were committed with the purpose, intent and effect of discouraging and stifling competition in interstate commerce". In the instant case the complaint specifies that the practices "are all to the prejudice of the public and respondent's competitors, and constitute unfair methods of competition in commerce," etc. Just as there held, the complaint in this case, respondent submits, did not charge "unfair competition within the proper meaning of these words", and the order therefore is a nullity. Cf. *Philip Carey Manufacturing Company v. Commission,* 29 Fed. (2d) 49, where it was held a similarly deficient complaint could not be remedied on appeal.

Moreover, when the "Findings as to the Facts and Conclusion" of the Commission (R. 12-24), promulgated simultaneously with and as the basis of its order, are examined, no finding that the public or competitors have been deceived or that there is monopoly is found. The only statement even approaching the necessary basis for jurisdiction and the issuance of a valid order is contained in Paragraph 9 of the findings of fact, where despite the absence of any allegation of monopoly in the complaint it is alleged that the sales method of respondent is "prejudicial and injurious to the public and its competitors," and hence results in diversion of trade to respondent from its said competitors, and is a restraint upon and a detriment to the freedom of trade and legitimate competition in the candy industry. In other words, it is averred that a diversion of trade *results from* "prejudice and injury to competitors" caused by the sales plan. Certainly a curious allegation, without any assertion of indispensable jurisdictional facts. This is all that the complaint or findings disclose under a statute which makes it mandatory for the Commission to allege and prove the use of methods which are deceptive and misleading or which tend to create a monopoly.

Clearly we have here a complaint, which like that before the Supreme Court in the case of *Commission v. Curtis Publishing Company, supra,* was merely "a vague general complaint charging unfair methods of competition * * *" (p. 580); and findings of a purely general character, which do not allege deception, bad faith, fraud or oppression or the existence of efforts to create a monopoly.

Aside from the insufficiency of the complaint, there was no evidence of "monopoly", for there is an utter absence in the record of any evidence of coercion, refusal to deal, and the like. There is positive evidence to the contrary. (R. 76) Further, while respondent's sales represent a certain percentage of the purchasing power of the public for this type of candies, it is likely the sales plan increases the candy trade as a whole rather than diminishes it. It is purely speculative to say that respondent's competitors would make larger sales if this plan were not followed. The present customers might turn to an entirely different type of merchandise or amusement.

In this case the small retailer is enabled to continue in business despite chain-store competition which has a virtual monopoly on straight goods. (R. 68) Surely this is not restraint of trade but promotion of competition.

Nor was there any evidence of "deception". Indeed, it is not disputed that an entire box of respondent's "break and take" candy contains as much value as any box of straight goods (R. 72) and that respondent makes no greater profit on one kind than the other. The objection is that the value is not distributed equally between the customers. But this is not deception or bad faith.

The record discloses that consumers of this penny goods know precisely by what method of retailing the candies are being disposed of and know the size of the candies they are purchasing; and that what they may receive or what they may pay depends on the contents of the package. There is no element of fraud or deceit here, no misrepresentation, and no unfairness; but on the contrary, as recognized by

the Circuit Court of Appeals, explicit information is available to the consumers in carefully prepared and truthful display cards. It is then clear that the candies are "truthfully displayed and offered to the purchasing public" as commented on in *Fluegelman & Co. v. Commission* (37 Fed. (2d) 59, 61) and hence are not "deceptive".

Respondent submits that the history of this legislation and the decided cases clearly show that the practice here complained of was not in the minds of Congress or intended to be reached by the act.

The candy industry has universally employed prizes in connection with the sale of penny candies over a long period of years, and no exception was taken to this practice as a perfectly legitimate trade instrument by the Federal Trade Commission until the year 1924. In other words, the Commission waited from 1914, when it was organized, until 1924—a period of ten years—before it conceived that business practices employed by 85 per cent of the members of the candy industry were unfair trade practices. A few complaints then issued, and nearly all early cases were won before the Commission by the candy manufacturers. Thereafter, the matter was dropped, until the year 1930 when the Commission began anew its campaign to extend the meaning of the statutory phrase "unfair methods of competition". This long delay amply demonstrates that this is a case falling within the language quoted above from the *Gratz* case, that the words "unfair methods of competition" obviously would not apply to "practices never heretofore regarded as opposed to good morals", et cetera. *On the contrary, this case simply boils down to an instance of a minority of the members of an industry who represent an insubstantial portion of the trade endeavoring to control through the medium of an agency of the Federal Government the actions of the majority.* (R. 96) This minority cleverly attempts to cloak their efforts to rid themselves of legitimate competition with a mantle of righteousness. They say they are protecting the children of the country

from the gambling instinct, and they rely on this to show "public interest" within the meaning of the law. But this effort of the minority candy manufacturers must fail, for a reading of the record enables an appraisement of this testimony at its true worth—nothing—for the motive in the end is *more profits.* Note for example the testimony of the chief witness called for the Commission, one Voneiff, who testified on pages 127-8 that he manufactured draw packages to meet competition rather than lose that volume of business despite the fact he was opposed to the plan in principle, and on page 160 that he had recently put out a punch board, in order to meet competition, although he expected, sooner or later, "to be picked up by the Government."

Respondent further submits with deference that this Court will not hestitate to disavow the declared purposes of the Commission in instituting any proceeding and issuing a cease and desist order. The courts can discern and declare the real purpose of any proceeding appearing from the record as distinguished from the purpose stated by the Commission. Thus, in *Federal Trade Commission v. Raladam Company, supra,* this Court refused to countenance an order of the Commission which would have benefitted medical practioners acting through the American Medical Association rather than any legitimate competitors in trade of the Raladam Company.

In this case, as the record clearly demonstrates, the moving force behind the complaint and the proceedings thereunder was the National Confectioners Association which a number of years ago adopted a policy against the "break and take" packages. Members and officers or former officers of that Association or their employees constituted the greater number of the witnesses at the hearing in this case and their testimony, for lack of any substantial connection with the respondent and its products, was directed at what the Association felt was the deleterious effect as a whole of the "break and take" packages on the "straight goods"

trade. Curiously enough, we find that three of the manufacturers who attended as witnesses, including one who arranged for the presence of four of his salesmen as witnesses, sold very substantial quantities of straight goods to chain stores and syndicated drug stores, who by buying in bulk are able to monopolize the straight goods trade. Obviously, these officers of the National Confectioners Association dictated the policies of that Association and obviously the Association is maintained for the benefit of its members. What greater benefit is there from a purely commercial point of view than profits? Thus, it is no unfair inference that the policies of the Association are dictated by its officers, who are officials of manufacturers selling largely to chain stores, and who desire the elimination of the prize assortments not handled by those stores, to increase the sales of straight goods by such stores and thereby the market for their own product.

Referring again to the Commission's principal witness who appeared with four of his sales representatives, and who himself declined to sign a stipulation to stop the manufacture of "break and take" packages, clearly all evidence emanating from his company must be disregarded since, as has been repeatedly pointed out by the Courts, those engaged in the same practices as the person against whom complaint is issued, are not entitled to the protection of the Federal Trade Commission Act, *Federal Trade Commission v. Raladam Company, supra*, p. 652.

(c) *Discussion of Opinion of Court Below.*

The court below adopted the meaning of the element of unfairness in the term "unfair methods of competition in commerce," repeatedly set out by this Court in its decisions as above shown, and held that there was no unfairness in this case because there was not disclosed here any practice which tended to hinder competition or create monopoly or which was characterized by deception, bad faith, fraud or

oppression. The Court also agreed that not all practices which are opposed to good morals or public policy amount to unfair methods of competition. The decision is then summed up in two short paragraphs (R. 375-6) which for convenience respondent quotes at this point (63 F. (2d) 83):

> The petitioner did nothing against public policy, within the restricted sense of the term, because its acts did not, of themselves, tend to hinder competition nor create monopoly. Whatever they did, their competitors could do. Other candy manufacturers were free to use the same sales methods as those of the petitioner and to obtain their share of the penny candy trade on an equal footing with the petitioner. The testimony shows that a decided majority of candy manufacturers did in fact use similar methods. There is nothing in the petitioner's practices tending to hinder competition or create monopoly.
>
> The answer to the contention that the petitioner's practices constitute a breach of good morals, and, in that respect, unfair methods of competition, is that there is nothing in the case to show deception, fraud, or bad faith affecting its competitors or the ultimate consumer. Display cards sent by the petitioner to accompany the merchandise contain a complete, fair, and accurate description of the sales plans. The consumer receives a piece of candy for his cent and, although he knows that the quantity is relatively less than if no prize were given, he is satisfied to deprive himself of the difference in bulk in exchange for his opportunity to obtain a prize.

The dissenting opinion of Mr. Justice Woolley, respondent feels, is amply answered by the majority opinion below and by this brief. Specific portions of that opinion are commented on hereinafter as appears appropriate to the discussion of particular phases of the case.

(d) *Reply to Argument of Commission as to Unfair Methods.*

In opening its statement, the Commission states that this is a test case, and by a footnote indicates that 64 complaints have issued against other candy manufacturers charging them with using similar methods of sale. In the light of the later showing in that brief, supported by the evidence (R. 324), that 380 manufacturers out of the 450 members of the National Confectioners Association or 85 per cent, manufacture "break and take" candies, respondent is led to wonder why no complaints have been issued against the remaining 315 manufacturers of these goods. In any event, the present is no novel situation. Numerous cases in which orders of the Commission to cease and desist have been reversed were test cases in which the entire industry was interested, as for example *Federal Trade Commission v. Gratz*, 253 U. S. 421; *Federal Trade Commission v. Sinclair Refining Company*, 261 U. S. 463, and *Berkey and Gay Furniture Company v. Federal Trade Commission*, 42 Fed. (2d) 427. Respondent is confident the pendency of the other complaints will merely increase the care of this Court to see that the Commission does not overstep the bounds of its limited statutory jurisdiction.

The statement and brief of the Commission evinces a consistent attempt to prejudice this Court by continuous use of the terms "lotteries" or "lottery devices" in describing the "break and take" or prize assortments manufactured and sold by respondent. Respondent submits such descriptive language, grafted on to the case by the Commission, should be entirely disregarded and the practices of respondent considered for what they are, as properly described in the complaint (Paragraph Two, R. 3-5).

In its argument on the subject of "unfairness" the Commission endeavors to avoid the doctrine of the *Gratz* case by the contention that the enumeration in that case of "deception, bad faith, fraud or oppression" was not intended

to be exhaustive and then contends that the term "unfair methods of competition" was intended to provide a "broad, flexible, all-inclusive standard." (p. 23) The Commission then endeavors to include within the inhibition of the statute the sale of "break and take" assortments merely because, it is alleged, that they are opposed to good morals or are against public policy. No significance whatever is attached by the Commission to the qualifying expressions used by the court in its definition of unfair methods of competition in the *Gratz* case. Clearly, when the court said *"good morals because characterized by deception, bad faith, fraud or oppression"*, it was speaking with a purpose to limit the application of the statute and it did not go on record as holding broadly, as the Commission argues, that *all* practices opposed to good morals generally are unfair methods of competition. Likewise, when the court spoke of "practices *against public policy because of their dangerous tendency unduly to hinder competition or to create a monopoly*", the qualifying phrases used must be recognized and given full weight. Here again the Commission's argument would tend to the conclusion that any practice against public policy, no matter on what ground is proscribed by the statute. This is an evident misconception of the court's decision, which held that it is only that public policy aimed at the prevention of monopolies and undue restraints on competition which can be invoked under the Federal Trade Commission Act. Thus we come to a most important phase of this case, viz., that mere illegality and mere opposition to public policy are not enough to vest jurisdiction in the Commission, but there must be illegality based on deception of the public or there must be a practice against public policy by which competition is restrained or monopoly is created. The Commission goes the whole limit, in its argument as it must, to sustain an order to cease and desist in this case. No court has ever adopted such a broad construction of the Federal Trade Commission Act and respondent is confident

no court ever will. Under its interpretation the Commission could prosecute all offenses committed in business relations, as distinguished from personal relations, if interstate commerce were involved. Put somewhat differently, the essence of the contentions of the Commission in this case is, since there was not even a charge of monopoly or deception, that it has jurisdiction merely because of the alleged illegality of, or contravention of public policy by, respondent's sales policy. The Commission stands or falls upon the soundness of the proposition but reference to the careful safeguards with which the Court in the *Gratz* and later cases has surrounded its definition of the term "unfair method of competition" is all that is necessary to show that this position of the Commission is basically false.

In its effort to avoid the effect of the *Gratz* case, the Commission places reliance in its brief on the statement by this Court in *Federal Trade Commission v. Raladam Company, supra,* p. 648, that the phrase "unfair methods of competition" belongs to that class whose meaning and application must be arrived at by the gradual process of judicial inclusion and exclusion. Respondent does not assail this position; but certainly this language of the court, while clearly applicable to the statute, is not applicable to the statement of its meaning by this Court in the Gratz case. That judicial definition of the phrase still stands and has not been amplified. This showing is a complete answer to the argument of respondent on pages 22-26 of its brief.

Furthermore, realizing perhaps that its attempt to broaden the doctrine of the Gratz case will fail, the Commission now argues, despite the absence of any such charge in the complaint or any findings to justify the contention, that this case does disclose the existence of "bad faith", within the Gratz case. It is a sufficient answer to state that the argument is not founded on any testimony nor encompassed within the pleadings. It was expressly disclaimed by counsel during the taking of the testimony (R. 70, 71). These comments apply with equal force to the further attempt

to meet the Gratz opinion, when the Commission asserts as it did for the first time in the court below, that respondent's sales plan has a tendency to hinder competition or create monopoly. It is indeed too late to make such charges for the first time in the Commission's brief in the courts, as pointed out in *Philip Carey Manufacturing Company v. Commission*, 29 Fed. (2d) 49. These charges can not be seriously considered. The testimony shows that truthful display cards are furnished with each prize assortment, setting forth the plan of merchandising involved. See, for example, Commission's Exhibit No. 5 (R. 357), being display card furnished with the assortment known as "1-2-3 Big Chief 60's." The display cards furnished with the other two assortments involved, being Commission's Exhibit No. 2 (R. 351) and Commission's Exhibit No. 9 (R. 365), are also in all respects true and correct. While the Commission suggests (pp. 29, 30) that these last two display cards should set forth the number of prize-winning pieces in the several assortments, the absence of such information on the cards is largely immaterial, for it is probable such information would be ignored by the purchasers, as brought out in the final sentence of footnote on page 30 of the Commission's brief. However, if the court should consider this omission significant, respondent will make the necessary revision of its display matter.

The testimony indicates that the quality of the merchandise is the same as in staple goods but the quantity is diminished to cover the cost of the prizes. It further indicates that there is as much interest in the chance for a prize as in the merchandise itself (R. 110). But is there anything inherently wrong in that? If the child spent his money in a penny arcade for the chance to shoot an electric pistol, or to receive a card foretelling his future or even to work a device whereby a few sugar coated licorice candies are obtained, and maybe a toy motor car or other prize, he is amused and satisfied; but is the Commission to step in and insist this trade be diverted to a purely merchandising transaction

minus the element of amusement? The Trade Commission Act did not so contemplate. It might just as well be said the Commission could stop one hotel from having orchestral music during dinner, because the customer undoubtedly pays therefor in his bill, when another hotel without an orchestra serves a better meal at the same price.

On page 21 the Commission indicates that the view of the Court below, that respondent's practices did not hinder competition under the *Gratz* case was founded on the fact that other competitors could do the same thing as respondent. However the opinion of the Court below goes further, pointing out that not only could other candy manufacturers obtain their share of the penny trade by the same methods and on an equal footing with the respondent, but that the testimony shows that "a decided majority of candy manufacturers did in fact use similar methods." The same remarks apply to the further statement by the Commission in reference to the opinion of the Court below, that in answering the contention the practices are unfair and they constitute a breach of good morals, the Court said "there was nothing in the case to show deception, fraud or bad faith affecting competitors or the ultimate consumer." Here again the Court below gave its definite reasons for its conclusion, *i. e.*, that the display cards with which respondent accompanied its merchandise contained "a complete, fair and accurate description of the sales plan." Furthermore, that the consumer received a piece of candy for his cent, and though he realized the quantity received was less than if he bought straight goods, he was satisfied to deprive himself of the difference in bulk in exchange for his opportunity to win a prize.

The Court therefore refused to adopt the Commission's contention that this practice was unfair under the Act merely because it was alleged to be contrary to public policy or illegal.

The respondent is reminded by the Commission's comments on the opinion below of the language of Judge Deni-

son of the Circuit Court of Appeals for the Sixth Circuit in his separate opinion in *L. B. Silver Company v. Federal Trade Commission,* 289 Fed. 985, 992-3:

> In this matter, as in many others currently familiar, the Commission has adopted the theory that the "unfair methods of competition" denounced by section 5 include all false, not to say unethical, advertising and promotion of a particular article by which that fraction of the public desiring to purchase an article of that class may be, in a substantial way, misled. The vista of business censorship seen through such an opening is limitless. It extends to the advertising of fire sales when there has been no fire, and of cut price sales when there has been no cut, provided sales are to be made across a state line. Such suggestions are not fancifully extreme. In the present case, thousands of pages of testimony have been taken, thousands of dollars of expense incurred, for the government and for the respondents, and the time and attention of the Commission and of the Circuit Court of Appeals consumed to the total extent of many days—all over questions of porcine genealogy and eugenics * * * I do not believe that the Federal Trade Commission was created for any such purpose, or that the time and efforts of the federal courts should be devoted to such situations.

Expressions to the same effect are found in numerous cases. For example in *New Jersey Asbestos Company v. Federal Trade Commission,* 264 Fed. 509, where the Circuit Court of Appeals for the Second Circuit reversed an order of the Commission holding that the entertainment of customers by employees held no public interest, since the practice did not constitute fraud, it was said at page 511:

> "* * * So broad a construction of the statute would bring within the disposition of the commission a vast number of subjects and controversies which in their nature belong to the legislative and judicial departments of the government."

The quotations by the Commission on page 24 of its brief from the legislative history of the Federal Trade Commission Act, torn from their context, would indicate a very broad construction of the term "unfair methods of competition," but such was not intended by the Congress. It aimed only at those practices which tended to restrain trade or create monopoly as this court has heretofore declared. *Federal Trade Commission v. Raladam Company, supra.* This ruling is clearly borne out by the portion of the Conference Report immediately preceding the paragraph quoted, as set forth in the Appendix to this brief, page 55.

The Commission states on page 22 of its brief that it will show at pages 27-34 that respondent's practice tends to hinder competition or create monopoly, but by reference to those pages the showing appears to be all on the point of deception which has been already answered above. And too respondent notes that the grounds of unfairness summarized on pages 27-28, in paragraphs enumerated 1, 2 and 3 are all arguments directed toward the mere ethics of the sales methods. Reference is made to the findings in support of several of these grounds, but as shown by respondent's statement of this case (pp. 3-9) there is contradiction in the testimony on nearly every material fact.

The Commission asserts that the candy in the prize assortments is either smaller in size or "poorer in quality" than straight goods and emphasis is placed on this alleged fact in its argument for a reversal of the order of the Court below. The above noted confusion between the respondent on the one hand and the entire industry, which is not before the Court in this case, on the other, is also indicated here. Finding Eleven states the candy in the "break and take" packages of "all manufacturers" of that type is smaller in size or poorer in quality than straight goods. But the testimony on this is not unanimous. One witness testified (R. 223) that "there are very fine grades in this 'break and take'; lots of very fine bars in them; we for one

use the best bars—full sized bars—regulation size a nickel would buy".

The true situation as respecting respondent appears in Paragraph 12 (R. 21), namely that the quality of the candy in respondent's "break and take" packages is the same as in the case of "straight goods" but the quantity is less to compensate for the value and weight of the prizes. Another manufacturer testified to the same effect in respect of his product (R. 147). Respondent suggests that obviously all penny candy may not be as high grade as the more expensive kinds, but it must and does conform to all Federal and State laws, whether sold in prize assortments or otherwise; obviously, it is therefore pure and wholesome and no question of any injurious effect on the health of consumers can arise. After all the problem of whether children shall be permitted to purchase certain goods or assortments of candy or indeed any candy at all is one for the individual home and parent, and not for the Federal Trade Commission. Doubtless medical testimony could be obtained to show that the health of children would be improved if they were not permitted any penny candy. Certainly the Commission would not seek to eliminate the entire penny candy industry of the United States.

Citation is made of a number of cases arising under the Federal or State lottery laws, but we look in vain for any reference in such statutes to "unfair methods of competition," nor have any cases been pointed out in which lotteries have been held within the scope of the Federal Trade Commission Act. Indeed, the case of *Holoman v. State*, 2 Tex. Ct. App. 610, cited by the Commission, discloses that, contrary to the instant case, where the merchandising feature is predominant and the sales plan is merely incidental to effect the sale of the candy, the candy was sold at 50 cents a box merely as a cloak for an outright lottery, the fortunate purchaser obtaining a prize of $10 in money or jewelry. The Commission throughout its brief argues

that the prize assortments constitute lotteries. But from footnote on page 32 we observe that *"No claim is made that respondent violated the Federal lottery statutes."* Why, respondent inquires, if these are lotteries under numerous state laws as contended, do we find 85 per cent of the members of the National Confectioners Association being permitted to continue the manufacture of such packages? Certainly in but few states have any such rulings been handed down. *But whatever may be the application of State criminal statutes, the important fact is that the Commission has absolutely no authority to enforce those statutes.* That was made clear by the reasoning of this court in *Hammer v. Dagenhart,* 247 U. S. 251.

The Commission has not even attempted to say that in the so-called lotteries here in question, the public is misled or deceived, but solely that all members of the public may not receive the same value for their money. This is not deception or misrepresentation, for all realize that the prizes can go only to the few.

If the Congress had intended that the sales methods here involved should be deemed "lotteries" and prohibited as such, it could have enlarged the scope of the anti-lottery legislation which has existed since the passage of the Act of March 2, 1895 (28 Stat. 963). That Congress has not done so is a clear indication that it did not intend to reach this type of merchandising as distinguished from lotteries.

A mere desire by [redacted] minority candy manufacturers, to prevent the use of [redacted] thods for the alleged reason that gambling among children is promoted thereby, and that the Commission is willing to participate in this "movement", still does not sufficiently relate it to the Government's policies as expressed in the anti-monopoly acts to vest jurisdiction in the Commission.

The Commission, as has been repeatedly held, was not organized as a business panacea or cure-all for the ills of trade, and we confidently maintain that the Commission has no jurisdiction over practices such as here involved because

it has no power to broadly prevent gambling, if this be gambling, just as it has no power broadly to prevent theft or murder. These practices have no relation to the anti-trust or anti-monopoly policy of the government. Instead the case is governed by the view of this Court in the *Raladam* case (p. 654) that whether the respondent "was subjecting itself to administrative or other proceeding" under the Food and Drug Act need not be inquired into, for the administration of that act was not committed to the Federal Trade Commission. By the same token, we are not in any way concerned here with whether respondent is amenable to the Federal or State anti-lottery laws. The Commission has no jurisdiction to enforce those acts, and, respondent insists, the Commission is unjustifiably attempting to usurp the functions of other agencies, state and federal, created for their enforcement. The Commission has here departed from the purpose of its creation and is attempting to interfere with the police power of the several states. There have doubtless been many instances in which free competition has been hindered by unfair methods, such as strikes, sabotage, and the like; but no one has ever contended that the Commission was organized to deal with these types of business coercion. Equally the Commission has no authority to enforce anti-lottery or gambling statutes.

The showing made herein of the rapid growth of the sale of penny goods to chain stores which do not sell "break and take" assortments and the corresponding drop in the sales to independent retailers over the past several years, is abundant proof that the independent retailers, striving to eke out a meager livelihood through the sale of this "break and take" merchandise deserve protection rather than deprivation of this source of business. The official publications of the Department of Commerce of the United States of which this Court takes judicial notice, show the great growth in sales of candy to chain stores over the pe-

riod from 1929 to 1931 and the corresponding decrease over this period of sales to independent retailers. These figures appeared in respondent's brief in opposition to the petition for writ of certiorari, pages 12 and 13.

The Commission places reliance on the case of *Federal Trade Commission v. Winsted Hosiery Company*, 258 U. S. 483. But the context of the opinion in that case shows that the court was dealing exclusively with the subject of misbranding or mislabeling, which resulted in the public being misled to its disadvantage. This the Commission admits on page 36 of its brief. The showing of false labeling in the Winsted case is utterly unlike the present case, where the practice not only has been employed by a great majority of the candy industry for many years (85 per cent of the candy manufacturers (R. 324), and 99 per cent of the wholesalers and jobbers, exclusive of those serving chain stores (R. 73),) until it has become a recognized institution in the sale of low priced candies, but the method pursued has in it nothing of that inherent fraud and deception which is the basis of the decisions of the courts against misbranding.

Under the state of the law as shown, and upon the record made in this case, respondent submits the Commission is here seeking an unjustified and dangerous extension of the principle of "unfair methods of competition"—unjustified because not supported by the long accepted interpretation of the statute; and dangerous—because it shows an attempt unlawfully to encroach on the functions of other regulatory agencies, federal or state, and to assume a paternalistic control over all types of business practices in commerce. A similar effort by the Commission to acquire a jurisdiction not contained in the organic act was frustrated by this Court in *Commission v. Raladam Co., supra*, where is declared in no uncertain terms the inability of the Commission or of the courts to enlarge the jurisdiction of the former. The instant case, respondent submits, is just another

attempt of the Commission to "merely assume" an unconferred jurisdiction.

II. The Issuance of the Complaint in this Case Was Not to the Interest of the Public as Required by the Federal Trade Commission Act.

This Court has frequently stated that the public interest referred to in the Federal Trade Commission Act, must be "specific and substantial" (*Federal Trade Commission v. Klesner, supra,* p. 28, and *Federal Trade Commission v. Raladam Company, supra,* p. 649); and must be an interest *based on deception or fraud, i. e. the public must be misled or deceived to its disadvantage;* or the interest must arise from *a direct tendency to create a monopoly.* For instance, in *Commission v. Raladam Company, supra,* p. 647, it is stated that one of the fundamental questions in a proceeding under the Federal Trade Commission Act is whether the methods "tend to the substantial injury of the public by restricting competition in interstate trade and 'the common liberty to engage therein' ". Again, in *Commission v. Sinclair Refining Company,* 261 U. S. 463, where it was held that the furnishing by oil refiners to dealers of pumps at nominal rental for handling their products, such use to cease if the dealer used in the pumps the products of others, did not constitute unfair competition. In its opinion the court said (pp. 474-475):

> Is the challenged practice an unfair method of competition within the meaning of Section 5 of the Federal Trade Commission Act? * * * Certainly the practice is not opposed to good morals because characterized by deception, bad faith, fraud or oppression. *Federal Trade Commission v. Gratz,* 253 U. S. 421, 427.

In the case of *Commission v. Winsted, supra,* the Supreme Court made the significant comment on page 494 that "as a substantial part of the public was still misled by the use of the labels which the Winsted Company em-

ployed, the public had an interest". Thus there must be deception which misleads a substantial part of the public before there arises "public interest." Again, see the case of *Berkey and Gay v. Commission, supra,* where it was held following the opinion of the Supreme Court in the *Gratz* case, there must be some practice "characterized as deception, fraud or even unfairness" and "that injury to public interest is thereby shown".

The Commission has admitted in the Record (pp. 70-1) repeatedly that there is no false advertising, that there are no misleading statements and that there is no intention to deceive the purchasers by the "break and take" candy. The consumers of this penny goods know precisely by what method of retailing the candies are being disposed of, the size of the candies they are purchasing, and that what they may receive or what they may pay depends on the contents of the package. There is no element of fraud or deceit here, no misrepresentation, and no unfairness, but on the contrary explicit information is available to the consumers in carefully prepared and truthful display cards.

Nor is there any charge or evidence of monoply for the record shows eighty-five per cent of the candy manufacturers employ the same sales methods as respondent and compete on an entirely equal basis. Of the remaining 15 per cent several manufacture a product which is not suited to the sales plan complained of but those who refrain from using that plan do so voluntarily and not because of any coercion by respondent. Respondent places no restriction on other candy manufacturers to dispose of their merchandise as they desire, or any restriction upon the right of their wholesaler and jobber customers to handle the product of any other manufacturer. Thus there is no specific and substantial injury to competitors within the meaning of the Federal Trade Commission Act. No restraint of trade is evident here. On the contrary, the record shows that through the "break and take" assortments the small in-

dependent candy merchant and storekeeper is enabled to survive disastrous chain store competition which has a virtual monopoly of "straight" candy sales, from their ability to buy in bulk and undersell. *To withdraw these pieces from their shelves, would result in forcing many of these small merchants out of business. The trade which they now command would revert to the larger retailers or chain stores and concentrate in a relatively few hands the bulk of the penny candy trade.* (R. 68.) These chain stores buy from manufacturers of "straight" goods and are directly interested with them in eliminating the competition of respondent and others in like situation through the order of the Commission made in this proceeding. Thus this is an attempt by the small minority of the candy manufacturers to control the industry to their financial advantage and the financial advantage of their large customers, the chain stores and thus *the Commission's order would directly tend to produce that condition of monopoly, which the Congress sought to prevent.*

There is a decided movement in the United States to protect independent stores from the over-powering effect of chain store competition. See *State Board of Tax Commissioners of Indiana v. Jackson,* 283 U. S. 527, and *Great Atlantic & Pacific Tea Company v. Maxwell,* 284 U. S. 575. As was said by Mr. Justice Brandeis in his dissent in *Liggett Company v. Lee,* 288 U. S. 517, 541, the Florida law there under consideration "is legislation of the type popularly called Anti-Chain Store Laws.* * * Its chief aim is to protect the individual, independently-owned, retail stores from the competition of chain stores."

Since it is admitted there is no deception in this case, the matter resolves itself to a purely private controversy between the majority and minority candy manufacturers of the country. In the case of *L. B. Silver Company, supra,* page 991, the Circuit Court of Appeals for the Sixth Circuit in the majority opinion found it unnecessary to decide whether the Federal Trade Commission had jurisdiction to

determine complaints as to unfair methods of competition where the general public, the ultimate consumer, was not misled, deceived or prejudiced thereby, but which involved only a controversy between dealers and breeders.

The findings of the Commission indicate an effort to show that the use of prizes in connection with merchandising candy is morally bad and encourages gambling, especially among children. Is this not merely applying ugly names to a simple transaction involving a comparatively small element of chance—the making of a mountain out a mole hill? But, for the sake of argument let us concede that the purchase of a piece of this candy is a sort of gambling and grant that it is important that the gambling instinct be not developed *to excess* in anyone, child or adult, nevertheless, how can it be said that the affirmance of this one order of the Federal Trade Commission will have such beneficent result? The element of chance is present in nearly all games and pastimes, particularly those of childhood, and represents much of the thrill and pleasure derived. Whether it is stealing a base in a ball game, or throwing dice in the time honored game of "Parcheesi", the element of chance is ever present. Many of the "obstacle" games so popular at Christmas and enjoyed at the family fireside are based on the chance of avoiding or incurring penalties or setbacks, determined by the spin of an arrow. How then can a certain development of the gambling instinct be avoided, and who would deprive the child of the pleasure and profit to be derived therefrom.

Educators and sociologists of recognized standing take the view that not only is the element of chance indispensable in the proper development of the individual but is a great recreative force. Note the following from the American Journal of Sociology, Vol. 7, p. 760, from Article entitled the "Gambling Impulse":

> The instinct is born in all natural persons. It is one expression of a powerful reflex, fixed far back in ani-

> mal experience. The instinct is, in itself, right and indispensable * * *.

Again from "Personality and Conduct" by Maurice Parmelee, 1918, p. 58:

> Mankind possesses a deeprooted tendency to take risks which manifests itself in the spirit of adventure and is strengthened by the desire to gain something. This human tendency has been of great social value * * *.

Further, from "Memory and Thought Series", Vol. 2, "Quickness of Perception" by E. W. Hassler, dealing with mental stimulus to be derived from games, p. 73, it appears:

> All legitimate games at cards combine chance and skill. It is the element of chance in them that makes them truly recreative, and because it renders it impossible for the most expert always to win, makes them popular for social pastime.

However, even if we should concede that it is morally bad to buy candy, hoping to find a penny therein; or to play "Parcheesi" (and incidentally the Commission has as yet filed no complaint against the manufacturers of that game), still this certainly is not the character of public interest which under the law is a condition precedent to the issuance of a valid order to desist. Decided cases amply demonstrate that the public interest required by the statute must be definitely connected with the merchandising in such a way that it be shown that the public is *deceived* or *misled* to its disadvantage—that it is not obtaining the product which it understands it is to receive. Thus we have here no proof, but, on the contrary, a specific disclaimer by counsel for the Commission of any intention or effort on the part of petitioner to deceive or mislead the public. We refer again to the record (pp. 70-1) where both counsel for the Commission and the examiner pointed out that there was no charge of any false or misleading advertising or fraud or deception

on the public. The court below ruled that no deception was shown. There can not therefore exist in this case either unfair methods of competition as defined in the statute or such public interest as is there required.

The court below, having clearly indicated the lack of unfairness, apparently felt it unnecessary to pass on the existence of any public interest which would justify the Commission's order..

When the Commission endeavored to establish a substantial and specific public interest in this proceeding it produced testimony derived solely from persons connected with the candy trade. No member of the "public" as such was called to testify; instead there were nine manufacturers of candy, two storekeepers, and five salesmen called by the Commission in this case.

What the "public" thinks of the influence of the element of chance in the games and pastimes of children is set forth above, pp. 42-43.

Since we have shown that the methods here are not unfair methods under the act, public interest—even if conceded—will not avail the respondent; but it is clear that the injury to the public interest under the *Gratz* and other cases must arise specifically from the unfairness of the methods, viz., from deception or from monopoly. Since there is no charge of monopoly here and it is conceded there is no deception, there can not be that public interest which the act presupposes. It is not all practices against morals which are condemned but those only which involve the elements of deceit or monopoly. It seems appropriate to repeat one sentence from the *Northam Warren* decision, p. 198: "In order that the Commission proceed in the public interest, the courts have insisted not only upon a showing that the practice is unfair and disapproved but also that the public are misled thereby," citing the *Klesner* decision of this court.

When the Commission argues in the last point of its brief that this proceeding is to the interest of the public, it is not there shown, as the rule established by the decisions of the

courts require, that this interest flows from any "unfairness". A vague general interest does not meet the statute. This is all on which the Commission has to rely. In fact, the principal interest shown is the desire of certain manufacturers who sell straight goods to chain stores and syndicate drug stores to eliminate the competition of those who sell "break and take" goods to independent dealers. The Act is designed to promote competition, not throttle it.

The Commission refers to a portion of the dissenting opinion of Judge Woolley below, which, after assuming the methods here in question to be unfair to children, says that if the methods of sale are unfair *either* to the purchasing children or to competitors, the Commission has jurisdiction, because the children and the competitors *each* represent a "public" under the law. This is clearly erroneous and in conflict with numerous decisions of this court. For example, see *Federal Trade Commission v. Raladam Company,* 283 U. S. 643, where this court denied jurisdiction of the Commission because competitors were not affected, despite the presence in the case of an assumed public interest.

III. The Federal Trade Commission Has Failed to Adduce Satisfactory Proof of the Existence of a Method of "Competition" in Commerce.

The section, as pointed out by this Court in *Federal Trade Commission v. Raladam, supra,* p. 647, was designed "to stop in their incipiency those methods of competition embraced under the term 'unfair' ", which purpose presupposed that among the prerequisites to jurisdiction in the Commission to issue a proper order to cease and desist was that the methods involved be "methods of *competition* in commerce", Ibid, p. 649.

> It is obvious that the word "competition" imports the existence of present or potential competitors, and the unfair methods must be such as injuriously affect or tend thus to affect the business of these competitors

> —that is to say, the trader whose methods are assailed as unfair must have present or potential rivals in trade whose business will be or is likely to be, lessened or otherwise injured. It is that condition of affairs which the Commission is given power to correct, and it is against that condition of affairs, and not some other, that the Commission is authorized to protect the public. Official powers cannot be extended beyond the terms and necessary implications of the grant. If broader powers be desirable they must be conferred by Congress. They cannot be merely assumed by administrative officers; nor can they be created by the courts in the proper exercise of their judicial functions.

This court accordingly held in the *Raladam* case that the Commission could not order a manufacturer of an obesity remedy to desist, where it was not shown that there were competitors who might be injured by the practices of the company.

The Court commented in the *Raladam* case that no finding or evidence showed substantial injury to the business of any competitor or of competitors generally. "None of the supposed competitors appeared or was called upon to show what, if any, effect the misleading advertisements had, or were likely to have, upon his business." The only evidence in that case concerning the existence of competitors came from medical sources with some slight evidence of the purchase of anti-fat treatments by one witness. The Court then continued (p. 653):

> * * * It is impossible to say whether, as a result of respondent's advertisements, any business was diverted, or was likely to be diverted, from others engaged in like trade, or whether competitors, identified or unidentified, were injured in their business, or were likely to be injured, or, indeed, whether any other anti-obesity remedies were sold or offered for sale in competition, or were of such a character as naturally to come into any real competition, with respondent's preparation in the interstate market. All this was left without proof

and remains, at best, a matter of conjecture. Something more substantial than that is required as a basis for the exercise of the authority of the Commission.

The instant case shows no more substantial testimony that respondent's practice is a method of "competition" under the Federal Trade Commission Act than was present in the *Raladam* case. The proof shows an absence of a substantial number of competitors affected by the methods criticized. The evidence before the Federal Trade Commission shows that the great majority of the candy manufacturers of the United States employ the distribution methods of which the Commission complains in this proceeding. 380 out of 450 active members of the National Confectioners Association manufacture and sell "break and take" candies, (R. 324) *i. e.*, only 15 per cent of the candy manufacturers in the Association fail to employ these distribution methods, while 85 per cent of the candy manufacturers engage in the sale of candies through the use of the same methods that the Commission is seeking to compel respondent to cease. These methods have been recognized factors in the distribution of the so-called "penny goods" candy for many years. Furthermore, the record discloses that of the 15 per cent who fail to employ these methods some did so because their type of merchandise was not suited to this sales plan (R. 101, 270).

The courts are loath to interfere with accepted methods of competition which have been recognized in the particular trade or business over a long period of years. In *Federal Trade Commission v. Gratz, supra,* this Court set aside an order of the Federal Trade Commission requiring parties to desist from a course of business on the ground, among others, that the sales practice there complained of represented the custom in the trade. In *Berkey & Gay Furniture Co. v. Federal Trade Commission,* 42 Fed. (2d) 427, the Circuit Court of Appeals for the Sixth Circuit pointed out early in its opinion, in which it reversed the order of the

Commission, as a significant fact, that "the practice is substantially universal". In *New Jersey Asbestos Company v. Federal Trade Commission, supra,* it was noted that the practice there involved was a business incident of long standing.

Furthermore, the Commission has no function to protect the majority of candy manufacturers who are all employing the same methods, from one another (*Commission v. Raladam Company, supra*) nor is the Commission justified in preventing the use of a long-standing trade method for the benefit of the minority who, having the opportunity of employing the same trade method, refuse to do so. The minority have elected the basis upon which they will compete, and can not complain if their competitors are not brought down to a common level with them. In *Commission v. Sinclair Refining Company*, 261 U. S. 463, it was said (pp. 475-6):

> The powers of the Commission are limited by the Statutes. It has no general authority to compel competitors to a common level, to interfere with ordinary business methods, or to prescribe arbitrary standards for those engaged in the conflict for advantage called competition.

There is a very fundamental reason why the courts hesitate to disturb well recognized business practices long indulged in by the majority of those in the trade, namely that there is a lack of any substantial competition. This is exactly the situation here. The majority of the candy manufacturers make the assortments involved, and it is only the small minority who are complaining.

Attempt is made by the Commission to argue that a small minority of those engaged in business might constitute sufficiently substantial competition to meet the statute, but the quotation from the *Raladam* opinion on page 38 of the Commission's brief does not bear out that contention. In any event, the competition proven is too insubstantial to

warrant the affirmance of an order which would deprive respondent of 60 per cent of its manufacturing business.

From the record (p. 341) it appears the Trial Examiner found in paragraph IX of his report:

> There is no evidence in the record that any competitor of the respondent has been injured in his business by reason of the "Break and Take" product manufactured and distributed by respondent, other than that which shows that the business of all candy manufacturers who make only "Straight Goods" is injured by all "Break and Take" goods on the market.

The Commission found exactly to the contrary (Paragraph Nine, p. 19). But while respondent recognizes that the findings of the Commission as to facts, if supported by testimony, are conclusive, the existence in a given case of a method of "competition" is not factual but, as is clearly apparent from the opinion of this Court in the *Raladam* case, a legal concept or conclusion to be drawn from primary facts. In any event, as indicated by this Court in *Federal Trade Commission v. Curtis Publishing Company*, 260 U. S. 568, 580, the Court has "power to examine the whole record and ascertain for itself the issues presented and whether there are material facts not reported by the Commission."

Manifestly, the existence of any substantial competition between respondent's product, and that of competitors has not been shown, and it is not for this Court to conjecture that the Commission could have produced such competitors. On this record, respondent submits, it has not done so.

IV. Respondent's Candy Assortments Were Not Articles of Interstate Commerce at the Time of the Employment of the Sales Methods in Question.

The Commission has never made any attempt to control the sale of candy by retailers, for the very evident reason that these sales are not made in interstate commerce. But

it is the methods used by retailers in their sales to customers of which the Commission complains. Respondent's goods are delivered to the retailers in cartons, and the Commission has found as a fact, in Paragraph 8 (R. 18), that all sales made by respondent herein "are absolute sales" and it "retains no control in any manner over the goods after they are delivered to the wholesale dealer or jobber * * * ".

Under these circumstances the argument that the Commission has jurisdiction over the manner in which respondent sells its product is a strain on the term interstate commerce. There is no contention that the use of prize features plays a part in respondent's sale of its goods to wholesalers or in the sale of such goods by the wholesalers to retailers. The Commission's contention is based on the fact that these retailers who are in no way controlled by respondent, conducted their sales in such manner that they might be said to be operating a lottery. Sales to the consumer are conducted by retailers wholly within the various States and are in no way connected with interstate commerce. Over them the Commission has no jurisdiction.

Again, if the position of the Commission were given full effect, it would result that the sale of any article which was capable of any improper use would have to be restrained; but no one would contend—not even the Commission—that it could enjoin the sale of any product just because it could be used in a way to break the law, deceive the public, or with other unfortunate results. Are the manufacturers of dice, pistols, playing cards, roulette wheels or backgammon boards to be held responsible for the use by others of the articles they manufacture on the ground that this constitutes "unfair competition" on their part? This would be palpably absurd. Since their business operations do not violate the law, no responsibility attaches to them for what remote purchasers may do with their product.

Further, the Federal cases are all opposed to the Commission's position. For example, see *Kinney-Rome Co. v.*

Federal Trade Commission, 275 Fed. 665, where the Commission sought to compel the petitioner there to cease its practice of giving premiums to salesmen employed by retailers handling its goods. The order was reversed, the court stating (p. 669):

> The rights which it is urged have been affected are the rights of other manufacturers and also the rights of the public. Unless that which petitioner did fraudulently affected some competition in which either or both were interested, then the order to cease and desist was improvidently entered. It is conceded that no manufacturer had any right to interfere in the merchant's business. It is equally true that, when any manufacturer sold to the merchant, he met, overcame, and ended any competition in which he had any interest. His interest in those goods was terminated, and when they again entered the channels of trade they entered as the goods of a new owner, along with the other goods owned by him. The new owner's problems were with other retail dealers, handling oftentimes goods identical in make and kind with his own, and competing for the favor of the buying public. It needs no discussion to show that that was wholly his competition, to be met in his own way, by his own methods, and in it the manufacturer had no part. Any plan or scheme to advance one kind of goods and to keep back another is a matter wholly and absolutely under the control of the merchant in meeting his problems in his competition, and does not constitute a fraud, nor is it unfair to any one who does not own the goods.
>
> Likewise the public, if it has an interest in competition has such interest only in the competition between different merchants. It has no right to demand for itself that a merchant shall set up a competition in his own house and between his own goods. The channels of trade that must be kept open for the manufacturer are those that run between him and other manufacturers, and necessarily end when he has sold. The channels of trade that must be kept open for the buying public do not run through the retailer's store, but do run between the different stores seeking the favor of the buying public.

V. The Commission Exceeded Its Jurisdiction When it Attempted in Its Order to Interfere With Certain Steps in Respondent's Business Which Constituted Manufacture, as Distinguished from Commerce.

This point refers to Paragraphs 4 and 5 of the order of the Commission, whereby respondent is ordered to cease and desist from:

> (4) Packing or assembling in the same package or assortment of candy, for sale to the public at retail, pieces of candy of uniform size, shape and quality containing within their wrappers tickets bearing different prices, or bearing the word "free", or phrases containing said word.
>
> (5) Packing or assembling in the same package or assortment of candy, for sale to the public at retail, pieces of chocolate-covered candy of uniform size, shape and quality, having centers of different color, together with larger pieces of candy, or articles of merchandise, which said larger pieces of candy, or articles of merchandise, are to be given as prizes to the purchaser procuring a piece of candy with a center of a particular color.

The complaint in this case does not cover the packing or assembling of the assortments of candy except in the most general language. In any event it is indisputable that the "packing or assembling" of respondent's goods in a certain manner is all conducted within the confines of the state in which the factory is located, and hence would not in itself constitute interstate commerce. The "packing or assembling" of respondent's goods is "manufacture" as distinguished from "commerce", as is clearly brought out in the case of *Utah-Idaho Sugar Company v. Federal Trade Commission,* 22 Fed. (2d) 122, where numerous authorities directly in point are cited, including the case of *Kidd v. Pearson,* decided by the Supreme Court at 128 U. S. 1. Hence the Commission transcended its authority in including these paragraphs in its order.

Furthermore, the Commission has no jurisdiction to interfere with the intrastate business of respondent. Nor could the Congress under the commerce clause vest the Commission or any Federal agency with any such jurisdiction. Manufacture and sale in the state of Pennsylvania of these prize assortments can still be carried on by respondent, it is submitted, even should this court sustain the Commission's order in other respects. Obviously, therefore, the Commission cannot issue an order directed against the preparation by respondent of its prize assortments, and paragraphs 4 and 5 thereof must in any event be set aside.

The Commission did not contest this contention of respondent in the Court below.

CONCLUSION.

Counsel for the Commission have labored diligently to work up a case of jurisdiction; but, lacking a suitable foundation therefor in a charge of monopoly or deception, bad faith, fraud or oppression in the complaint, and proof thereof in the testimony, have been compelled to rely vaguely on good morals and public policy. But the Commission has no general jurisdiction of such matters. The existence of none of the three indispensable elements of "unfair methods," "public interest" or substantial "competition" has been shown.

As was said in the case of *Northam Warren Company v. Federal Trade Commission, supra,* and quoted by the Court below, "The Federal Trade Commission Act does not purport to establish a decalogue of good business manners or morals". The decision of the Court below is correct and its judgment should be affirmed.

Respectfully submitted,

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APPENDIX.

Legislative History of the Federal Trade Commission Act.

The act was enacted in response to a message of President Wilson delivered January 20, 1914, on the subject of anti-trust legislation, from which message we quote in part as follows (italics ours):

> The business of the country awaits also, has long awaited and has suffered because it could not obtain, further and more explicit legislative definition of the policy and meaning *of the existing antitrust law*. Nothing hampers business like uncertainty. Nothing daunts or discourages it like the necessity to take chances, to run the risk of falling under the condemnation of the law before it can make sure just what the law is. Surely we are sufficiently familiar with the *actual processes and methods of monopoly* and of the many hurtful *restraints of trade* to make definition possible, at any rate up to the limits of what experience has disclosed. * * *
>
> * * * * * * * * *
>
> The opinion of the country would instantly approve of such a commission. It would not wish to see it empowered to make terms with monopoly or in any sort to assume control of business, as if the Government made itself responsible. * * * (Senate Report 597, pp. 6-7.)

The following from Senate Report 1327, 62nd Congress, 3rd Session, on Senate Resolution 98, which authorized the holding of hearings by the Committee on Interstate Commerce, preliminary to drafting a Trade Commission bill, is in point (p. 33) (embodied in the appendix in Senate Report No. 597):

> * * * It is believed that through the intervention of such a body of men the legislative policy with respect to combinations and monopolies could be vastly more effectual than through the courts alone, which in most cases will take no cognizance of violations of the

> law for months or years after the violations occurred and when the difficulty of awarding reparation for the wrong is almost insurmountable.

The Senate Report, No. 597, 63rd Congress, 2d Session, quoted from in part in footnotes to the dissenting opinion of Justices Brandeis and Clarke in *Federal Trade Commission v. Gratz, supra,* 431, also discloses the type of practice which was within the purview of the act, where the examples of unfair practices cited are "local price cutting, interlocking directorates and holding companies intended to restrain substantial competition". While, of course, not all inclusive, these examples disclose the type of practice which was prohibited and that it must substantially restrain competition.

From the Statement of the Managers on the part of the House, to Conference Report, H. R. Report No. 1142, 63rd Congress, 2nd Session, pp. 18 and 19, it appears:

> Section 5 declares unfair methods of competition to be unlawful and empowers the commission, after hearing, to order the discontinuance of the use of such methods.
>
> It is now generally recognized that the only effective means of establishing and maintaining monopoly, where there is no control of a natural resource as of transportation, is the use of unfair competition. The most certain way to stop monopoly at the threshold is to prevent unfair competition. This can be best accomplished through the action of an administrative body of practical men thoroughly informed in regard to businesss, who will be able to apply the rule enacted by Congress to particular business situations, so as to eradicate evils with the least risk of interfering with legitimate business operations.

Further passages from these reports were embodied in the above-mentioned footnotes to the dissenting opinion of Justices Brandeis and Clarke in *Federal Trade Commission v. Gratz, supra,* pp. 433-6.

SUPREME COURT OF THE UNITED STATES.

No. 194.—October Term, 1933.

Federal Trade Commission, Petitioner, *vs.* R. F. Keppel & Brother, Inc.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[February 5, 1934.]

Mr. Justice Stone delivered the opinion of the Court.

This case comes here on certiorari, 290 U. S. —, to review a decree of the Court of Appeals for the Third Circuit, which set aside an order of the Federal Trade Commission forbidding certain trade practices of respondent as an unfair method of competition. 63 F. (2d) 81; § 5, Federal Trade Commission Act, 28 Stat. 717, 719.

The Commission found that respondent, one of numerous candy manufacturers similarly engaged, manufactures, sells and distributes, in interstate commerce, package assortments of candies known to the trade as "break and take" packages, in competition with manufacturers of assortments known as "straight goods" packages. Both types are assortments of candies in packages in convenient arrangement for sale by the piece at a small price in retail stores in what is known as the penny candy trade. The break and take assortments are so arranged and offered for sale to consumers as to avail of the element of chance as an inducement to the retail purchasers. One assortment, consisting of 120 pieces retailing at 1 cent each, includes four pieces, each having concealed within its wrapper a single cent, so that the purchasers of those particular pieces of candy receive back the amount of the purchase price and thus obtain the candy without cost. Another contains 60 pieces of candy, each having its retail price marked on a slip of paper concealed within its wrapper; 10 pieces retail at 1 cent each, 10 at 2 cents, and 40 at 3 cents. The price paid for each piece is that named on the price ticket, ascertained only after the purchaser has selected the candy and the wrapper has been removed. A third assortment consists of 200 pieces of candy, a

few of which have concealed centers of different colors, the remainder having white centers. The purchasers of the candy found to have colored centers are given prizes, packed with the candy, consisting of other pieces of candy or a package containing lead pencils, penholder and ruler. Each assortment is accompanied by a display card, attractive to children; prepared by respondent for exhibition and use by the dealer in selling the candy, explaining the plan by which either the price or the amount of candy or other merchandise which the purchaser receives is affected by chance. The pieces of candy in the break and take packages are either smaller than those of the competing straight goods packages, which are sold at a comparable price without the aid of any chance feature, or they are of inferior quality. Much of the candy assembled in the break and take packages is sold by retailers, located in the vicinity of schools, to school children.

The Commission found that the use of the break and take package in the retail trade involves the sale or distribution of the candy by lot or chance; that it is a lottery or gambling device which encourages gambling among children; that children, enticed by the element of chance, purchase candy so sold in preference to straight goods candy; and that the competition between the two types of package results in a substantial diversion of trade from the manufacturers of the straight goods package to those distributing the break and take type. It found further that in some states lotteries and gaming devices are penal offenses; that the sale or distribution of candy by lot or chance is against public policy; that many manufacturers of competing candies refuse to engage in the distribution of the break and take type of package because they regard it as a reprehensible encouragement of gambling among children; and that such manufacturers are placed at a disadvantage in competition. The evidence shows that others have reluctantly yielded to the practice in order to avoid loss of trade to their competitors.

The court below held, as the respondent argues here, that respondent's practice does not hinder competition or injure its competitors, since they are free to resort to the same sales method; that the practice does not tend to create a monopoly or involve any deception to consumers or the public, and hence is not an unfair method of competition within the meaning of the statute.

Upon the record it is not open to question that the practice complained of is a method of competition in interstate commerce and that it is successful in diverting trade from competitors who do not employ it. If the practice is unfair within the meaning of the Act, it is equally clear that the present proceeding, aimed at suppressing it, is brought, as § 5 of the Act requires, "in the interest of the public". The practice is carried on by forty or more manufacturers. The disposition of a large number of complaints pending before the Commission, similar to that in the present case, awaits the outcome of this suit. Sales of the break and take package by respondent aggregate about $234,000 per year. The proceeding involves more than a mere private controversy. A practice so generally adopted by manufacturers necessarily affects not only competing manufacturers but the far greater number of retailers to whom they sell, and the consumers to whom the retailers sell. Thus the effects of the device are felt throughout the penny candy industry. A practice so widespread and so far reaching in its consequences is of public concern if in other respects within the purview of the statute. *Federal Trade Commission* v. *Royal Milling Co.*, 288 U. S. 212, 216. Compare *Federal Trade Commission* v. *Klesner*, 280 U. S. 19, 28. Hence we pass without further discussion to the decisive question whether the practice itself is one over which the Commission is given jurisdiction because it is unfair.

Although the method of competition adopted by respondent induces children, too young to be capable of exercising an intelligent judgment of the transaction, to purchase an article less desirable in point of quality or quantity than that offered at a comparable price in the straight goods package, we may take it that it does not involve any fraud or deception. It would seem also that competing manufacturers can adopt the break and take device at any time and thus maintain their competitive position. From these premises respondent argues that the practice is beyond the reach of the Commission because it does not fall within any of the classes which this Court has held subject to the Commission's prohibition. See *Federal Trade Commission* v. *Gratz*, 253 U. S. 421, 427; *Federal Trade Commission* v. *Beechnut Packing Co.*, 257 U. S. 441, 453; *Federal Trade Commission* v. *Raladam Co.*, 283 U. S. 643, 652; *Federal Trade Commission* v. *Royal Milling Co., supra*, at 217. But we cannot say that the Commission's jurisdiction extends only

to those types of practices which happen to have been litigated before this Court.

Neither the language nor the history of the Act suggests that Congress intended to confine the forbidden methods to fixed and unyielding categories. The common law afforded a definition of unfair competition and, before the enactment of the Federal Trade Commission Act, the Sherman Act had laid its inhibition upon combinations to restrain or monopolize interstate commerce which the courts had construed to include restraints upon competition in interstate commerce. It would not have been a difficult feat of draftsmanship to have restricted the operation of the Trade Commission Act to those methods of competition in interstate commerce which are forbidden at common law or which are likely to grow into violations of the Sherman Act, if that had been the purpose of the legislation.

The Act undoubtedly was aimed at all the familiar methods of law violation which prosecutions under the Sherman Act had disclosed. See *Federal Trade Commission* v. *Raladam, supra,* 649, 650. But as this Court has pointed out it also had a broader purpose, *Federal Trade Commission* v. *Winsted Hosiery Company,* 258 U. S. 483, 493; *Federal Trade Commission* v. *Raladam Company, supra,* 648. As proposed by the Senate Committee on Interstate Commerce and as introduced in the Senate, the bill which ultimately became the Federal Trade Commission Act declared "unfair competition" to be unlawful.[1] But it was because the mean-

[1]The Senate Committee on Interstate Commerce, in recommending the bill in its original form, seems to have adopted the phrase "unfair competition" with the deliberate purpose of giving to the Commission some latitude for dealing with new and varied forms of unfair trade practices. The Committee said in its report of June 13, 1914, Senate Report No. 597, 63rd Cong., Second Session, page 13:

"The committee gave careful consideration to the question as to whether it would attempt to define the many and variable unfair practices which prevail in commerce and to forbid their continuance or whether it would, by a general declaration condemning unfair practices, leave it to the commission to determine what practices were unfair. It concluded that the latter course would be the better, for the reason, as stated by one of the representatives of the Illinois Manufacturers' Association, that there were too many unfair practices to define, and after writing 20 of them into the law it would be quite possible to invent others.

. . . . . .

"It is believed that the term 'unfair competition' has a legal significance which can be enforced by the commission and the courts, and that it is no

ing which the common law had given to those words was deemed too narrow that the broader and more flexible phrase "unfair methods of competition" was substituted.[2] Congress, in defining the powers of the Commission, thus advisedly adopted a phrase which, as this Court has said, does not "admit of precise definition but the meaning and application of which must be arrived at by what this Court elsewhere has called 'the gradual

more difficult to determine what is unfair competition than it is to determine what is a reasonable rate or what is an unjust discrimination. The committee was of the opinion that it would be better to put in a general provision condemning unfair competition than to attempt to define the numerous unfair practices, such as local price cutting, interlocking directorates, and holding companies intended to restrain substantial competition."

Senator Newlands, in introducing the bill for the Committee, emphasized this feature. In answering the criticism that the phrase "unfair competition" lacked definition he said, 51 Cong. Record, 11084:

"Our answer to this is that it would be utterly impossible for Congress to define the numerous practices which constitute unfair competition and which are against good morals in trade, for we are beginning to realize that there is a standard of morals in trade or that there ought to be. Germany does not hesitate by law to condemn practices in business that are *contra bonos mores*. It leaves their tribunals to determine what practices are against good morals.

. . . . . .

"It is the illusive character of the trade practice that makes it though condemned today appear in some other form tomorrow. If we should attempt to define all the trade practices that can be devised, that would create dishonest advantage in competition, we would undertake a hopeless task."

[2]The phrase "unfair methods of competition" was substituted for "unfair competition" in the Conference Committee. This change seems first to have been suggested by Senator Hollis in debate on the floor of the Senate in response to the suggestion that the words "unfair competition" might be construed as restricted to those forms of unfair competition condemned by the common law. 51 Cong. Record 12145. The House Managers of the conference committee, in reporting this change said, House Report No. 1142, 63rd Congress, 2nd Sess., September 4, 1914, at page 19:

"It is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field. Even if all known unfair practices were specifically defined and prohibited, it would be at once necessary to begin over again. If Congress were to adopt the method of definition, it would undertake an endless task. It is also practically impossible to define unfair practices so that the definition will fit business of every sort in every part of this country. Whether competition is unfair or not generally depends upon the surrounding circumstances of the particular case. What is harmful under certain circumstances may be beneficial under different circumstances."

process of judicial inclusion and exclusion' ". *Federal Trade Commission* v. *Raladam Company, supra,* 648; compare *Davidson* v. *New Orleans,* 96 U. S. 97, 104.[3]

The argument that a method used by one competitor is not unfair if others may adopt it without any restriction of competition between them was rejected by this Court in *Federal Trade Commission* v. *Winsted Hosiery Co., supra;* compare *Federal Trade Commission* v. *Algoma Lumber Co.,* 290 U. S. —, —. There it was specifically held that a trader may not, by pursuing a dishonest practice, force his competitors to choose between its adoption or the loss of their trade. A method of competition which casts upon one's competitors the burden of the loss of business unless they will descend to a practice which they are under a powerful moral compulsion not to adopt, even though it is not criminal, was thought to involve the kind of unfairness at which the statute was aimed.

The practice in this case presents the same dilemma to competitors, and we can perceive no reason for distinguishing between the element of chance as employed here and the element of deception involved in labelling cotton goods "Natural Wool," as in the *Winsted* case. It is true that the statute does not authorize regulation which has no purpose other than that of relieving merchants from troublesome competition or of censoring the morals of business men. But here the competitive method is shown to exploit consumers, children, who are unable to protect themselves. It employs a device whereby the amount of the return they receive from the expenditure of money is made to depend upon chance. Such devices have met with condemnation throughout the community. Without inquiring whether, as respondent contends, the criminal statutes imposing penalties on gambling, lotteries and the like, fail to reach this particular practice in most or any of the states, it is clear that the practice is of the sort which the common law and criminal statutes have long deemed contrary to public policy. For these reasons a large share of the industry holds out against the device, despite ensuing loss in trade, or bows reluctantly to

[3]References showing the details of the legislative history of the Act may be found in Handler, The Jurisdiction of the Federal Trade Commission over False Advertising, 31 Columbia Law Review 527; Montague, 'Unfair Methods of Competition', 25 Yale Law Journal 20; Henderson, The Federal Trade Commission, c. I.

what it brands unscrupulous. It would seem a gross perversion of the normal meaning of the word, which is the first criterion of statutory construction, to hold that the method is not "unfair". See *Federal Trade Commission* v. *Royal Milling Co., supra,* at 217; *Federal Trade Commission* v. *Algoma Lumber Co., supra,* at —.

While this Court has declared that it is for the courts to determine what practices or methods of competition are to be deemed unfair, *Federal Trade Commission* v. *Gratz, supra,* in passing on that question the determination of the Commission is of weight. It was created with the avowed purpose of lodging the administrative functions committed to it in "a body specially competent to deal with them by reason of information, experience and careful study of the business and economic conditions of the industry affected", and it was organized in such a manner, with respect to the length and expiration of the terms of office of its members, as would "give to them an opportunity to acquire the expertness in dealing with these special questions concerning industry that comes from experience". Report of Senate Committee on Interstate Commerce, No. 597, June 13, 1914, 63rd Cong., 2d Sess., pp. 9, 11. See *Federal Trade Commission* v. *Beechnut Packing Co., supra,* at 453; compare *Illinois Central R. R.* v. *Interstate Commerce Commission,* 206 U. S. 441, 454. If the point were more doubtful than we think it, we should hesitate to reject the conclusion of the Commission, based as it is upon clear, specific and comprehensive findings supported by evidence.

We hold that the Commission correctly concluded that the practice was an unfair method of competition within the meaning of the statute. It is unnecessary to attempt a comprehensive definition of the unfair methods which are banned, even if it were possible to do so. We do not intimate either that the statute does not authorize the prohibition of other and hitherto unknown methods of competition or, on the other hand, that the Commission may prohibit every unethical competitive practice regardless of its particular character or consequences. New or different practices must be considered as they arise in the light of the circumstances in which they are employed.

Reversed.